FILE COPY

Office Supreme Court, U.S.
FILED
APR 20 1960
JAMES R. BROWNING, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 876

JAMES FLOOD and MARY EMMA STEBBINS, as Trustees of the Trust Created by Paragraph III of the Last Will of JAMES L. FLOOD, Deceased, *Petitioners*

vs.

UNITED STATES OF AMERICA

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

FREDERICK M. FISK
WALTER C. FOX, JR.
VINCENT I. COMPAGNO
JOHN P. MACMEEKEN
111 Sutter Street
San Francisco 4, California

*Attorneys for Petitioners*

## INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions and Statutes Involved | 3 |
| Statement | 4 |
| Basis of Federal Jurisdiction | 9 |
| Argument | 10 |
| I. Certiorari should be granted to permit the court to settle important questions as to the obligations assumed by the United States when it takes temporary use of private property for public use and as to the constitutional rights of the owner upon breach of those obligations | 10 |
| II. The decision below creates a direct conflict in authority as to the liability of the United States for just compensation when it fails to return property taken for temporary use in the condition received | 13 |
| III. The decision below establishes an oppressive rule which in sanctioning the confiscation of property permits the United States to profit handsomely by the intentional breach of its admitted duty | 15 |
| Conclusions | 16 |

| | Appendix Page |
|---|---|
| Appendix A—Opinion Below | 1 |
| Appendix B—Judgment Below | 9 |
| Appendix C—Constitutional provisions and statutes involved | 10 |

## AUTHORITIES

### CASES


| | Pages |
|---|---|
| Appleton v. Marx, 191 N. Y. 81, 83 N. E. 563 (1908) | 15 |
| In re Condemnation of Lands, 250 Fed. 314 (E.D. Ark. 1918) | 14 |
| Kimball Laundry Co. v. United States, 338 U. S. 1 (1949) | 10, 11, 13 |
| Lane v. Spurgeon, 100 Cal. App. 2d 460, 223 P.2d 889 (1950) | 11 |
| Philips v. United States, 206 F.2d 867 (9th Cir. 1953) | 14 |
| Trick v. Eckhouse, 82 Ind. App. 196, 145 N. E. 587 (1924) | 14 |
| United States v. 14.4756 Acres of Land, 71 F. Supp. 1005 (D. Del. 1947) | 14 |
| United States v. 37.15 Acres of Land, 77 F. Supp. 798 (N.D. Cal. 1948) | 14 |
| United States v. 266.33 Acres of Land, 96 F. Supp. 647 (W.D. Wash. 1951) | 14 |
| United States v. Certain Parcels of Land, 55 F. Supp. 257 (D. Md. 1944) | 14 |
| United States v. Flood Building, 157 F. Supp. 438 (N.D. Cal. 1957) | 13 |
| United States v. General Motors Corp., 323 U. S. 373 (1945) | 10, 12, 13, 15 |
| United States v. Jordan, 186 F.2d 803 (6th Cir. 1951) | 11 |
| United States v. Miller, 317 U. S. 369 (1943) | 16 |
| United States v. One Parcel of Land, 131 F. Supp. 443 (D. D.C. 1955) | 14 |
| United States v. Petty Motors Co., 327 U. S. 372 (1945) | 10 |
| United States v. Westinghouse Co., 339 U. S. 261 (1950) | 10 |
| Vanhorne's Lessee v. Dorrance, 2 U. S. (Dall.) 303 (1795) | 16 |
| Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612 (1899) | 12, 15 |


### CONSTITUTIONS


| | |
|---|---|
| United States Constitution, Amendment V | 3, 10, 11, App. 10 |

STATUTES


| | Pages |
|---|---|
| Title 28, U.S.C.: | |
| Section 1254(1) | 2 |
| Section 1331 | 9 |
| Section 1345 | 9 |
| Section 1358 | 9 |
| Title 40, U.S.C.: | |
| Section 257 | 3, 9, App. 10 |
| Section 304c | 3, 9, App. 10 |

# In the Supreme Court of the United States

OCTOBER TERM, 1959

---

NO. .....

---

JAMES FLOOD and MARY EMMA STEBBINS, as Trustees of the Trust Created by Paragraph III of the Last Will of JAMES L. FLOOD, Deceased, *Petitioners*

vs.

UNITED STATES OF AMERICA

---

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

*To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 25, 1960.

## OPINIONS BELOW

The opinion of the District Court (R. 62-77) is reported in 157 F. Supp. 438 (N.D. Cal. 1957).[1] The opinion of the Court of Appeals (*infra*, Appendix A, pp. 1-8) is reported in 274 F.2d 483 (9th Cir. 1960).

## JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1960. The jurisdiction of this Court to issue the writ proceeds from the provisions of 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

The United States took the right to the exclusive use and occupancy of the Flood Building, San Francisco, California, for the housing of federal agencies. When the Government took the building it was laid out for use as a medical-dental building. The United States without consulting your petitioners, the owners of the building, destroyed the medical-dental fixtures and converted the building to a Government office building. Ignoring your petitioners' written demand for restoration, the United States returned the building at the conclusion of use as altered to suit its taste and convenience.

1. When the United States takes only the right to the temporary use and occupancy of a building and alters that building to suit its taste and convenience, does it assume the duty to restore the building to the condition in which it was taken, reasonable wear and tear excepted, or may it force the property owner to accept his property in a different condition?

---

1. Inasmuch as nine additional copies of the record as printed for the use of the Court of Appeals have been filed pursuant to Rule 21(4), the opinion of the District Court is not appended to this Petition. Rule 23(1)(i).

2. If the United States, in taking the right to temporary use and occupancy of a building, assumes an obligation to return it in the condition received, reasonable wear and tear excepted, does the Fifth Amendment to the Constitution of the United States safeguard the owner in the event the Government breaches its duty?

3. If the Fifth Amendment to the Constitution of the United States protects an owner against default by the United States in returning a building altered to suit its taste and convenience, what is the measure of the just compensation payable by reason of the default?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:[2]

> "* * * nor shall private property be taken for public use, without just compensation."

Section 257 of title 40 U.S.C. provides in part:

> "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for * * * public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so * * *."

Section 304c of title 40 U.S.C. provides in part:

> "The Administrator of General Services is authorized to procure space by lease, on such terms and for such period not in excess of five years as he may deem in the public interest, for the housing of any Federal agency or agencies outside of the District of Columbia * * *."

---

2. The full text of the quoted constitutional and statutory provisions here involved is set forth in Appendix C, *infra*, pp. 10-11.

## STATEMENT

On January 29, 1951, the United States commenced an action to condemn the right to the exclusive use and occupancy of the Flood Building for the housing of federal agencies in San Francisco, California. The Flood Building, a twelve-story Class A steel concrete building in downtown San Francisco, was sought "for a term for years commencing February 1, 1951 and ending June 30, 1951, extendible for yearly periods thereafter at the election of the United States * * *" (R. 3-7). At the same time the United States secured an *ex parte* Order for Immediate Possession, under which it took possession of the building on February 1, 1951 (R. 8-9).

In taking the Flood Building, the United States took a building in no way designed for the housing of federal agencies. The ground floor of the building was devoted to retail shops and the basement housed a large cafeteria. After the Government had held this space idle for three months, it was returned to your petitioners (R. 9-14). The building's sixth through twelfth floors contained 117,257 square feet of rentable space, which was laid out for medical-dental occupancy (R. 119, 187). This space had accommodated 300 doctors and dentists (R. 392). The second through fifth floors of the building contained 50,923 square feet of rentable space laid out for commercial tenancies, including those of the type customarily found in a medical-dental center (R. 119, 187). Since a medical-dental building was wholly unsuited to the Government's needs, upon entering the building it immediately embarked upon the demolition of the building's medical-dental facilities.[3]

3. The parties stipulated in writing (Defs.' Exh. E; R. 95):
"That the plaintiff United States of America, after taking the use and occupancy of the Flood Building on February 1, 1951, and prior to the return of the subject premises made

In the Flood Building medical-dental suites were characteristically divided into a number of different rooms, such as reception rooms, dressing rooms, operating rooms, consultation rooms, laboratories, business offices and other space required in medical and dental practice. Serving these suites were medical and dental basins, sinks, lavatories, shelving, laboratory workbenches, cabinets, recessed file drawers, casement windows, X-ray viewboxes, gas and compressed air lines, and the electrical outlets required for medical and dental equipment. In its comprehensive demolition program, the United States destroyed the partitioning of the suites, thereby making several large rooms out of each suite. All of the medical-dental fixtures in the building were appropriated by the Government. Specifically, the United States demolished more than 12,757 lineal feet of partitioning walls (Defs.' Exh. AH; R. 159; Defs.' Exh. AI; R. 161). It carried off 987 doors of eight different types—valuable doors which it conceded it would cost $151,394.60 to replace—which were confiscated for use elsewhere by the General Services Administration (Defs.' Exh. AB; R. 134). Over 2,088 lineal feet of laboratory workbenches were destroyed (Defs.' Exh. X; R. 130). 266 twelve-inch by twelve-inch sinks were taken out (Defs.' Exh. Y; R. 130). 158 vitreous china basins were removed

---

alterations upon the third to twelfth floors, inclusive, on said building, which said alterations included the demolition of partitions, the removal of electrical wiring and conduit, the removal of lavatories, sinks, workbenches, cabinets, shelving, viewboxes, closets, the removal of gas piping, air piping, electrical outlets and switches, the removal and relocation of radiators, the removal of plumbing fixtures, the cutting of doors through walls, and the painting of stained and bleached oak room trim."

The majority of alterations were made pursuant to written contracts, which are in evidence and detail the work done. See: Defs.' Exhs. E, G, G-1 to 7, inclusive, H-1 to H-13, inclusive, I, J, K, L and M (R. 99-109).

(Defts.' Exh. Y; R. 130). 1,474 electrical outlets were torn out (Defs.' Exh. V; R. 128). 190 gas connections and 188 compressed air connections were destroyed (Defs.' Exh. W; R. 129). Recessed file cabinets were demolished (Defs.' Exh. U; R. 127). 107 lavatories were removed (Defs.' Exh. Y; R. 130). 113 medical sink cabinets were removed (Defs.' Exh. Z; R. 132). 37 X-ray viewboxes were destroyed (Defs.' Exh. S; R. 125). 52 casement windows were razed (Defs.' Exh. T; R. 126).

While this program of demolition was under way, the Government, electing to conclude its occupancy under the action commenced on January 29, 1951, filed a second action on June 29, 1951 (R. 33-38). By this second action the United States condemned the right to exclusive use and occupancy of the Building for a term commencing July 1, 1951 and ending June 30, 1952, extendible at the option of the United States for additional yearly periods (R. 34). Although the United States thereafter surrendered the second floor of the Flood Building, by its two actions, which were consolidated for trial, it effected a continuous occupancy of the third through twelfth floors of the building from February 1, 1951 to June 30, 1954.[4]

When your petitioners first learned that the United States intended to leave the Flood Building, they sought the advice of their real estate advisor, Mr. Colbert Coldwell, of Coldwell, Banker and Company, as to development of the building upon its return to them (R. 374-377, 405-409). In Mr. Coldwell's opinion the development of the Building would be enhanced by medical-dental space (R.

4. Following consolidation of the two actions for trial (R. 17, 44), the parties stipulated (Defs.' Exh. E; R. 95)

"12. That the obligation, if any, of the United States to restore the 3rd to 12th floors, inclusive, of the Flood Building to the condition in which they were received, reasonable wear and tear excepted, accrued on June 30, 1954."

403-405). As a result your petitioners on December 30, 1953, made a written demand that the United States return the premises at the conclusion of use in the condition in which the Building was taken by it on February 1, 1951, reasonable wear and tear excepted (Defs.' Exh. AR; R. 193). This demand was wholly ignored—indeed, never acknowledged! The United States thereafter on June 30, 1954, surrendered the Flood Building to your petitioners, over their objection, in the condition to which it had been altered to meet the taste and convenience of the United States (Defs.' Exh. E; R. 95). Indeed, even the valuable fixtures stripped from the premises were retained by the United States. The United States did not then or at any time question your petitioners' *right* to have their building returned in the condition taken. It merely argued that since the market value of the building had not been diminished they were not damaged by its default and hence could *not enforce* that right.

Thereafter, the actions having been consolidated for trial (R. 17, 44) and judgment having been entered by stipulation fixing the compensation payable for *use* of the premises alone (R. 23-32, 50-61), trial of the Government's liability for failure to surrender the premises in the condition received, reasonable wear and tear excepted, was had before the United States District Court for the Northern District of California, Southern Division, the Honorable Oliver J. Carter sitting without a jury. Extensive evidence was adduced as to the cost of restoring the premises to the condition in which they had been received, the Government urging that restoration could be accomplished for approximately $441,000, while petitioners' evidence fixed the cost of restoration at approximately $600,000 (R. 65). The Government's position

was that the owners had not been damaged by the default since the market value of their Building on the date of return was allegedly enhanced by the Government's unsolicited alterations. It argued, therefore, that it had no liability to the owners. Your petitioners, while claiming that the market value of the Flood Building was decreased by the alterations, insisted that their right to have their Building returned as taken from them was in nowise contingent upon the real estate market at the moment of return. While the District Court rejected the Government's position that its alterations had enhanced the value of the Flood Building, it concluded that your petitioners were not entitled to any compensation by reason of the Government's default. Its grounds for so holding it articulated as follows (R. 84-85):

"II.

On June 30, 1954, the United States of America, having altered the third through the twelfth floors of the Flood Building to suit its taste and convenience, was under an obligation to return those premises to the defendant trustees in the condition in which they had been received by it on February 1, 1951, reasonable wear and tear excepted.

III.

The United States of America in returning the third through twelfth floors of the Flood Building to the defendant trustees on June 30, 1954, in the condition to which they had been altered to suit its taste and convenience and without restoring the same to the condition in which they were received by it on February 1, 1951, reasonable wear and tear excepted, breached its said obligation to the defendant trustees.

IV.

Where the United States of America, having taken under its power of eminent domain the right to the

temporary use and occupancy of a building, alters that building and returns the same at the conclusion of its occupancy without restoring the same to the condition in which it was received, reasonable wear and tear excepted, the Fifth Amendment to the Constitution of the United States of America requires the Government to pay as just compensation for its failure to restore only the diminution in the market value of that building as of the date of its return when that sum is less than the cost of restoration."

V.

Since the market value of the Flood Building when returned to defendants on June 30, 1954, was as great as it would have been had it been returned on that date in the condition in which it was taken on February 1, 1951, the United States of America owes no sum to defendants as just compensation for its failure to restore the premises to the condition in which they were received, and defendants are entitled to take nothing."

The judgment of the District Court holding your petitioners entitled to no compensation was affirmed by the Court of Appeals, it being apparently the position of the Court that to apply a different rule than that adopted by the District Court "would put the owners in a better pecuniary position" than if the United States had discharged its duty to them.

## BASIS OF FEDERAL JURISDICTION

Federal jurisdiction over the Government's respective actions prosecuted pursuant to 40 U.S.C., secs. 257 and 304c, rested on 28 U.S.C., sec. 1358. *See also:* 28 U.S.C., sec. 1331, 1345.

## ARGUMENT

### I. Certiorari Should Be Granted to Permit the Court to Settle Important Questions as to the Obligations Assumed by the United States When It Takes Temporary Use of Private Property for Public Use and as to the Constitutional Rights of the Owner Upon Breach of These Obligations.

The Fifth Amendment to the Constitution of the United States provides in part "* * * nor shall private property be taken for public use, without just compensation." It is these twelve words that "condition the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). It is this Court that has given those words their meaning. Since the sovereign ordinarily condemns the fee, the critical terms of the guaranty, "property," "taken" and "just compensation" have traditionally been given meaning by this Court in the setting of the fee taking.

Of recent origin is the practice, pursued here, by which the United States takes not the fee but the right to *use* property for a specified term. Under this practice the condemnor does not "buy" the property, he "hires" it and returns it to its owner after Governmental use has ended. This new form of taking has required that the courts in general, and this Court in particular, re-examine the twelve-word constitutional guaranty in its new setting. In *United States v. General Motors Corp.* 323 U.S. 373 (1945), *United States v. Petty Motors Co.*, 327 U.S. 372 (1946), *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) and *United States v. Westinghouse Co.*, 339 U.S. 261 (1950), this Court has examined in detail one facet of such takings, namely, the just compensation payable for the temporary *use* of premises. In adopting market rental value as the measure of compensation for use, the position of the United States in

taking temporary use of private property has been likened by this Court to that of a tenant. *See e.g. Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). This tenant analogy points to the fact that the United States, in taking the temporary use of private property, must assume obligations beyond the obligation to pay the market rental value for use. The tenant hiring premises assumes other obligations. As a matter of law, a tenant impliedly covenants to return demised premises in the condition received, reasonable wear and tear excepted. *See e.g. United States v. Jordan*, 186 F.2d 803, 806 (6th Cir. 1951); *Lane v. Spurgeon*, 100 Cal. App. 2d 460, 223 P.2d 889 (1950). His rental is fixed in the light of this obligation. The questions presented in this case are twofold: *First*, does the United States assume a similar duty in a use and occupancy taking; and, *secondly*, if so, does the Fifth Amendment protect an owner if the United States breaches its obligation.

In the lower Courts it was held that the United States in taking only a right to use the Flood Building was under a duty to return the premises in the condition received, reasonable wear and tear excepted (R. 84). However, at the same time it was held that the petitioners had no right to any compensation upon the Government's breach of its duty. In this way, the basic right of an owner to the return of his property in the condition taken is rendered an euphemistic but empty fiction. In reaching this result, both the District Court and the Circuit Court were quick to point out that temporary takings of use represent a practice of recent origin. Rightly or wrongly, each insisted that the questions here presented had not been considered by this Court. We submit that they are vital questions which very much demand this Court's attention.

In this case hundreds of thousands of dollars worth of property were destroyed by the Government or carried off for its use elsewhere. Yet your petitioners are denied even one cent's compensation. Here the United States filed suit to take a building for five months' use and immediately commenced radical alterations without a word to the owners. It is an extraordinary thing if the United States can take property for a day, a week, a month or a year and, paying only for use, compel an owner against his will to accept the return of radically altered premises in lieu of those taken. Obviously, the payment of market rental value for *use* is in no sense compensation for invasions of an owner's right to enjoy his property at the conclusion of Governmental use in the condition in which it was taken from him. *Cf. Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899). Certainly nothing that this Court has previously held in considering temporary takings has suggested that the United States can claim any such prerogative.

Throughout this case the United States has unhesitatingly conceded that it was the *right* of petitioners to have their building returned in the condition in which it was taken. The District Court so held (R. 84). The Circuit Court did not question the obligation of the United States. The United States merely urged—and the lower Courts held—that petitioners had no redress of any kind when the United States elected to breach that obligation. The suggestion is repugnant on its face to the Fifth Amendment, which does not permit the fictionalization of a condemnee's rights. As was said by this Court in *United States v. General Motors Corp.*, 323 U.S. 373, 381-382 (1945),

> "If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just com-

pensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of 'value received' in that of contractual consideration."

## II. The Decision Below Creates a Direct Conflict in Authority as to the Liability of the United States for Just Compensation When It Fails to Return Property Taken for Temporary Use in the Condition Received.

In deciding the case below, the Court stated that, "The United States Supreme Court, though it has made some major decisions regarding just compensation in this relatively new field of temporary takings, has never addressed itself to the precise issue which is involved here." *United States v. Flood Building*, 157 F. Supp. 438, 442 (N.D. Cal. 1957). However, in *United States v. General Motors Corp.*, 323 U.S. 373, 383-384 (1945), this Court had categorically declared:

> "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's right in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected."

See also: *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1948).

That this admonition cannot conceivably be squared with the decision below is the lesson taught by every other case that has considered the Government's liability for just compensation upon failure to return premises temporarily taken in the condition received. In accordance with the property right acknowledged in the *General Motors* case, all courts—as did the lower Courts here—have recognized

the Government's duty to return premises at the conclusion of use in the condition received. *See e.g. United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. 14.4756 Acres of Land*, 71 F. Supp. 1005 (D. Del. 1947). Unlike the instant case, all other cases addressed to the Government's liability upon breach of that duty have held that the United States is liable for the amount required to place the premises in the condition in which the Government was obligated to return them. *In re Condemnation of Lands*, 250 Fed. 314, 315 (E.D. Ark. 1918); *United States v. 37.15 Acres of Land*, 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. 266.33 Acres of Land*, 96 F. Supp. 647, 648 (W,D. Wash. 1951) rev. others grds sub. nom. *Philips v. United States*, 206 F.2d 867 (9th Cir. 1953); *United States v. One Parcel of Land*, 131 F. Supp. 443, 446 (D. D.C. 1955). *See also: United States v. Certain Parcels of Land*, 55 F. Supp. 257, 264 (D. Md. 1944). No other measure of compensation secures to the owner his right.

Clearly, the measure adopted below does not secure to an owner his right to have his property returned to him in the condition received, reasonable wear and tear excepted. That right is lost when it is held, as it was below, that, "Where the United States of America, having taken under its power of eminent domain the right to the temporary use and occupancy of a building, alters and returns the same at the conclusion of its occupancy without restoring the same to the condition in which it was received, reasonable wear and tear excepted, the Fifth Amendment to the Constitution of the United States of America requires the Government to pay as just compensation for its failure to restore only the diminution in the market value of that building as of the date of its return when that sum is less than the cost of restoration." *Cf. Trick v.*

*Eckhouse*, 82 Ind. App. 196, 145 N. E. 587 (1924); *Appleton v. Marx*, 191 N. Y. 81, 83 N. E. 563 (1908); *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899). This rule in substance converts the Government's duty to a duty not to depreciate the market value of the fee. It thereby sanctions a taking—the alteration and stripping of the premises—without compensation, in direct conflict with *United States v. General Motors Corp.*, 323 U.S. 373, 383 (1945).

### III. The Decision Below Establishes an Oppressive Rule Which in Sanctioning the Confiscation of Property Permits the United States to Profit Handsomely by the Intentional Breach of Its Admitted Duty.

It is a frequently cited postulate that no man shall be allowed to profit by his wrong. Yet that is exactly what the United States is permitted to do by the rule announced below. By choosing to ignore an admitted duty, the United States has saved by its own admission not less than $441,000.00—the amount which it claims that compliance would have cost. Moreover, the rule announced below has allowed the Government to strip the premises temporarily taken and pay nothing for its loot. For example, the Government confiscated from the Flood Building 987 doors, which it admits could not have been replaced for less than $151,394.60. Against the risk of a dishonest tenant, a lessor has the protection inherent in the right to lease only to those he trusts. There is no protection of any kind under the rule announced below when the sovereign elects not to meet its obligation, unless the sovereign's depredations are perfectly reflected by market value on the date of the property's return.

The lower Courts while ignoring the Government's gain by default, asserted that the payment of compensation

would put the owners in a better position than they would have occupied if the United States had discharged its obligation, citing *United States v. Miller*, 317 U.S. 369, 373 (1943). In that case the questions presented in this case were not raised. It was cited below only for the Court's statement that, "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." The lower Court's assumption that this is done when a fee of equal market value to that taken is returned, is clearly falacious. The United States taking temporary use of Blackacre cannot at the conclusion of use return an equally valuable Whiteacre and thereby avoid liability for compensation. *Cf. Vanhorne's Lessee v. Dorrance*, 2 U.S. (Dall.) 303 (1795). The right to compensation arises not from the taking of some fractional part of the fee, but from the taking of the owner's right to have his property returned to him in the condition in which it was when taken from him. What the Flood Building would have sold for if placed on the market for sale on the date of its return by the United States is a wholly academic matter to petitioners who as trustees are concerned with the operation of the property in a state which will insure its continued integrity and income production over the many years to come. Their unquestioned right has been deprived of all substance by the judgments below.

## CONCLUSIONS

The instant case brings to this Court basic questions as to the constitutional obligations which arise when the United States takes the right to use and occupy premises rather than the fee. It raises the question whether the United States by paying market rental value for *use* acquires prerogatives far beyond those which a tenant

paying like amount acquires. It raises the question whether the United States is free to ignore duties which it assumes as a temporary taker because the Fifth Amendment according to the Courts below grants the owner no means to enforce those duties. These are questions of far-reaching import that we submit should be settled by this Court and to that end this writ of certiorari should be granted.

Respectfully submitted,

FREDERICK M. FISK
WALTER C. FOX, JR.
VINCENT I. COMPAGNO
JOHN P. MACMEEKEN
*Attorneys for Petitioners*

**(Appendices Follow)**

## *Appendix A*

*United States Court of Appeals*
*for the Ninth Circuit*

---

No. 16,224—Jan. 25, 1960

---

JAMES FLOOD and MARY EMMA STEBBENS, as Trustees of the Trust created by Paragraph III of the Last Will of James L. Flood, deceased,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

Appeal from the United States District Court for the Northern District of California, Southern Division

---

### OPINION

Before: STEPHENS, POPE and MAGRUDER, Circuit Judges.

MAGRUDER, Circuit Judge.

In this case we have to determine what is "just compensation" within the meaning of the Federal Constitution. Following its modern practice, the United States condemned here only a term for years. This practice has introduced many perplexities, some of which were dealt with by the Supreme Court in *United States v. Westinghouse Electric & Mfg. Co.*, 339 U.S. 261 (1950). See the dissenting opinion in the court below, 170 F.2d 752, 756 (C.A. 1st, 1948).

It is worth while to observe that the obligation of the United States is imposed only by the general provision of Amendment V to the Constitution, ". . . nor shall private property be taken for public use, without just compensation." The courts, and ultimately of course the Supreme Court of the United States, have to pour some specific meaning into this phrase "just compensation" as they pin-prick out the cases one by one. The Constitution does not say that the United States must pay the reasonable "market value" of that which it takes. Sometimes market value, and no more, is not deemed to be a "just compensation". The Supreme Court, instead of reducing "just compensation" to a pat formula, has adopted practical standards and "has refused to make a fetish even of market value, since that may not be the best measure of value in some cases." *United States v. Cors*, 337 U.S. 325, 332 (1949). As Frankfurter, J., said, concurring, in *United States v. Toronto &c. Navigation Co.*, 338 U.S. 396, 408 (1949), "experience counsels empiricism in dealing with these problems. And empiricism suggests sailing as close to the record of a particular case as possible. Only thus shall we avoid abstract pronouncements bound to distort or to be distorted by the case-by-case adjudicatory process especially appropriate in problems of this nature. Either lip-service will be paid such formulas while decisions are rooted in considerations outside them, or formulas not fitting practical circumstances will achieve impractical results."

Appellants herein are the owners of an office building, called the Flood Building, on Market Street in San Francisco, California. At one time the offices of the top floors had been rented almost exclusively to medical and dental tenants. The floors below contained many commercial tenants, including drug stores, laboratories, and other activi-

ties associated with the medical and dental professions. Appellants, however, had moved out the various tenants in the building prior to the effective date of a lease of the Flood Building to F. W. Woolworth Company. The lease contemplated the destruction of the building and the erection of a new one by the tenant.

At this point the United States decided that it needed the building for general office space. On January 29, 1951, it filed in the United States District Court for the Northern District of California, Southern Division, a complaint for condemnation of an interest in the upper floors of the building. What the United States condemned was "the right to use and occupy said premises for a term of years commencing July 1, 1951, and ending June 30, 1952, extendible for yearly periods thereafter until June 30, 1956, at the election of the United States, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term taken or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term or extension thereof any and all improvements and structures placed therein by or for the United States." The declared purpose of the taking was that the United States was proposing to use the premises "in connection with housing of Federal agencies in the City and County of San Francisco".

The United States, having been let into immediate possession, proceeded, properly enough, to make extensive alteration of the premises so as to render the same suitable for general office use. It removed certain partitions, sinks, workbenches, cabinets, etc. It terminated the exposed piping and electric wiring at the main walls, and it did necessary plastering and repainting and installed certain new fixtures such as radiators, electrical fixtures, and asphalt tiles. The net result of the government's alterations was to convert

into large offices what formerly had been medical or dental suites.

Having twice exercised its option to renew the lease, the United States ultimately surrendered possession of the premises on June 30, 1954. It elected to return the building as it then was, without incurring the expense of restoring it to the condition in which it was at the time of taking. There is evidence in the record as to what it would have cost the government to restore the building so as to render it again suitable for rental to medical and dental tenants; also, how long such work would have taken. The district judge in the view he took of the case found it unnecessary to resolve the conflicting evidence on this score. 157 F. Supp. 438.

On October 21, 1954, the district court entered a so-called "Final Judgment" which decreed the rental the United States would have to pay, pursuant to its obligation to make "just compensation" from the date of the taking to the final relinquishment of the building on June 30, 1954. These amounts for annual rental have been accepted by the owners, and there is no present dispute about this feature of the case.

But the parties were unable to agree upon what the United States should pay, if anything, because of its having turned back the building in a condition different from what it was at the time of taking. Accordingly, the "Final Judgment" of October 21, 1954, reserved jurisdiction in the district court to "determine the amount of compensation, if any, which the said defendants shall be allowed by reason of the failure of the United States to restore the premises hereinabove described to the condition in which they were at the time of the taking, ordinary wear and tear excepted."

At a subsequent date a hearing was held on the reserved point, and on June 10, 1958, the district court entered a

second so-called "Final Judgment" determining that appellants were entitled to no further compensation on account of the failure of the United States to restore the premises to the condition in which they were at the time of taking. The present appeal is from this judgment of June 10, 1958, appellants contending that the district court was in error in not allowing as additional compensation a sum of money equal to the cost of such restoration, together with a reasonable additional rental for the period which would be required to make the restoration.

The district court, upon adequate evidence, made the following findings of fact:

"IX.

When plaintiff took possession of the building on February 1, 1951, it did not disrupt a going medical-dental operation, since defendants had themselves theretofore caused all the medical and dental tenants, and all other tenants, in the building to vacate.

X.

Upon resuming possession of said Flood Building on July 1, 1954, defendants embarked on a campaign to rent space in said building for multiple general office purposes as distinct from medical-dental. This campaign was singularly effective, for by January, 1956, the office space in the building was ninety to ninety-five percent occupied by general office tenants. No effort whatever was made by defendants to secure medical-dental tenants.

XI.

The net return before insurance and depreciation, for the third through the twelfth floors of said Flood Building, as of January, 1956, for its then use of general office occupancy was $1.55 to $1.60 per square foot per year, or approximately $85,000 greater than the net return of $1.05 per square foot per year, for the second through the twelfth floors, for the best year of the

Flood Building's history, while operated as a medical-dental building.

XII.

In 1951, and for some years before, the Flood Building had ceased to be competitive in the medical-dental tenancy field, with the new and modern medical-dental office buildings in San Francisco, which were especially designed for use by physicians and dentists, such as the Fitzhugh Building, and the 490 Post Street Building and the 450 Sutter Street Building.

XIII.

At the time possession of the Flood Building was turned back to defendants on June 30, 1954, the condition set forth in Paragraph XII continued to exist, and was, if anything, aggravated by a considerable movement during the years 1953 and 1954 of tenants from medical buildings in downtown San Francisco to outlying and suburban areas.

XIV.

The three hundred or more medical and dental tenants which defendants caused to vacate the Flood Building in 1950 and 1951, had reestablished themselves in other buildings in downtown San Francisco and outlying suburban areas, in most instances at great expense to themselves, before June 30, 1954, and that prospective market was lost forever to defendants.

XV.

The highest and best use of the Flood Building, as of the date of its return to defendants, namely, June 30, 1954, was no longer for medical and dental tenancies, but rather for multiple general office usage.

. . .

XVII.

The Flood Building suffered no diminution in market value by reason of the plaintiff's taking, or the changes

made by the Government during its occupation. The fair market value of the building when returned on June 30, 1954, was as great as it would have been had it been returned on that date in the condition in which it was taken in 1951."

The court concluded that the United States was under an obligation to return the building to the condition in which it was at the time of taking, reasonable wear and tear excepted, and it conceded that the government had broken this obligation. But the court went on to point out that the obligation to restore, in the present circumstances, is not a contractual obligation such as may be voluntarily assumed by a private tenant, but is an obligation resting upon the United States solely in its capacity as a condemnor of the term for years. It determined that the United States owed no further "just compensation" because the measure of damages for the breach of its obligation to restore must be the diminution of the market value of the premises as of the date of its return, when that sum is less than the cost of restoration. The court found that there had been no diminution in the value of the building by reason of the government's alterations; in fact, that such value was really enhanced by what the government had done. We suspect that appellants would indeed have been chagrined had the United State elected to incur the expense of making the aforesaid restoration.

We agree with the district court that the owners were not entitled to recover the restoration costs under the circumstances stated. As the Supreme Court said in *United States v. Miller*, 317 U.S. 369, 373 (1943): "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." We know of no case which holds to the contrary, certainly none in the

Supreme Court. To allow such a recovery here would put the owners in a better pecuniary position. In support of the district court's conclusion, see *Realty Associates, Inc. v. United States*, 138 F. Supp. 875 (Ct.Cl. 1956). See also Comment, 33 N.Y.U. L. Rev. 882 *et seq.* (1958).

Appellants have not briefed or argued to us any possible liability of the United States for the salvage value of the fixtures taken by the government incidental to its alteration of the premises. Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 384 (1945). Therefore we say nothing in this opinion about that aspect of the case.

A judgment will be entered affirming the judgment of the District Court.

(Endorsed) Opinion Filed Jan. 25, 1960.

FRANK H. SCHMID, *Clerk*.

## *Appendix B*

*United States Court of Appeals*
*for the Ninth Circuit*

No. 16,224—Jan. 25, 1960

JAMES FLOOD and MARY EMMA STEBBENS, as Trustees of the Trust created by Paragraph III of the Last Will of James L. Flood, deceased,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

### JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United State District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and hereby is affirmed.

(Endorsed): Judgment
Filed and entered: January 25, 1960
FRANK H. SCHMID, *Clerk.*

## *Appendix C*

### AMENDMENT V—CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 257, Title 40, U.S.C.

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice. Aug. 1, 1888, c. 728, § 1, 25 Stat. 357; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 6, 62 Stat. 986.

Section 304c, Title 40, U.S.C.

The Administrator of General Services is authorized to procure space by lease, on such terms and for such period

not in excess of five years as he may deem in the public interest, for the housing of any Federal agency or agencies outside of the District of Columbia, except the Post Office Department, and to assign and reassign such space. To the extent that the appropriations of the General Services Administration not otherwise required are inadequate therefor, the Administrator of General Services may require each Federal agency to which leased space has been assigned to pay promptly by check to the Administrator of General Services out of its available appropriations, either in advance or during occupancy of such space, all or part of the estimated cost of rent, repairs, alterations, maintenance, operation, and moving: *Provided*, That when space in a building is occupied by two or more agencies, the Administrator of General Services shall determine and equitably apportion rental, operation, and other charges on the basis of the total amount of space so leased. Aug. 27, 1935, c. 744, § 3, 49 Stat. 886; July 18, 1940, c. 635, § 3, 54 Stat. 765; June 14, 1946, c. 404, § 4, 60 Stat. 257; June 30, 1949, c. 288, Title I, § 103, 63 Stat. 380.